PUBLIC PROSECUTOR

v.

ABDUL AZIZ BIN YUSOF

HIGH COURT, ALOR SETAR
DATUK K.C. VOHRAH
[CRIMINAL TRIAL NO. 47-7-1990]
5 NOVEMBER 1992

DANGEROUS DRUGS: Trafficking - s. 39B(1)(a) of the Dangerous Drugs Act 1952 - Whether accused trafficking in cannabis - Accused arrested with a bag containing packages of plant material - Whether plant material 'cannabis' - Whether resin in the material had not been substantially extracted - Sufficiency of the tests carried out by the chemist; possession - Whether accused knew of contents of bag - Presumptions under s. 37(d) and s. 37(da)(vi) of the Act - whether rebutted.

The accused was arrested as he was walking in the compound of the Mobil Petrol Station at Jalan Putra, Alor Setar. At that time he was carrying a cloth bag containing 2 packages of dried plant material. The prosecution claimed that, when accosted by the police, the accused tried to run away. According to the government chemist who analysed the material, the plant material was 'cannabis' within the meaning of the definition of s. 2 of the Dangerous Drugs Act 1952 [the Act] .. The defence challenged the evidence that the accused tried to run away, and the chemist's evidence that the resin in the plant material had not been substantially extracted, that the plant material was 'cannabis' within the meaning of the Act.

Held:
The accused was guilty of the charge.

[1] The accused must be presumed to have been in possession of cannabis and to have been trafficking in it.

(a) The court accepted the prosecution evidence that the plant material found in the packages in the bag carried by the accused to have contained a dangerous drug, cannabis, as defined under s. 2 of the Act, and that the accused had custody and control of the bag which contained the cannabis comprising of 3011.3 grammes. The court accepted the sufficiency of the tests carried out by the chemist and the conclusion of the chemist that the plant material in the packages was cannabis and that resin in the material had not been substantially extracted. The accused must be presumed to have been in possession of cannabis and to have knowledge of its nature, until the contrary was proved, as provided by s. 37(d) of the Act.

(b) Furthermore, in view of the weight of the cannabis being in excess of the presumptive amount, the accused must be presumed until the contrary was proved that he had trafficked in it, as provided by s. 37(da)(vi) of the Act.

[2] The presumptions under s. 37(d) and s. 37(da)(vi) had not been rebutted. On the balance of probability the accused knew that the substance he was carrying in the bag was cannabis and he was in possession of it. Furthermore, on the balance of probability, the accused was trafficking in the cannabis. Whether the accused tried to run away or not was merely one aspect of the totality of the evidence.

[Accused convicted].

Case referred to:
Loo Keck Leong v. PP [1992] 2 MLJ 177 ***(refd)***

For the Accused - K. Kumaraendran & M.M. Athimulan; M/s. Kumar Sitham & Co.
For the public prosecutor - Mohamad Saman b. Mohd. Ramli; DPP

JUDGMENT

K.C. Vohrah J:
The Accused is charged as follows -

> That you on 24 December 1989 at about 9.10 p.m. in front of Mobil Petrol Station, Jalan Putra, Alor Setar, in the District of Kota Setar, in the State of Kedah Darulaman, did traffic in on your own behalf dangerous drugs to wit, 3.011.3 grammes of cannabis and that you have thereby committed an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s. 38B(2) of the same Act.

The evidence adduced by the prosecution showed that on the date and time specified in the charge the Accused was arrested as he was walking in the compound of the Mobil Petrol Station at Jalan Putra, Alor Setar. At that time

he was carrying a cloth bag and the bag contained 2 packages of dried plant material. According to the government chemist who analysed the dried plant material, the material was "cannabis" within the meaning of its definition and a "dangerous drug" as defined under s. 2 of the Dangerous Drugs Act 1952 (the Act). The cannabis weighed 3011.3 grammes.

The prosecution's evidence that the Accused was arrested with the bag which contained 2 packages of plant material was not challenged. What the defence challenged was the evidence that the Accused tried to run away when the Inspector Fadzil accosted the Accused and identified himself as a police officer. The defence also challenged the chemist's evidence that the plant material is "cannabis" within the meaning of the Act.

Now for the evidence adduced by the prosecution.

At about 8.35 p.m. on 24 December 1989 Detective Corporal Hamzah (PW4) who was sitting at one of the stalls along Jalan Putra opposite the Mobil Petrol Station saw the Accused walk towards the stall where he was sitting. Corporal Hamzah saw that he had a bag with him. The man sat at a table and ordered a drink. At about 9.10 p.m. he saw the man cross the road and walk towards the Mobil Petrol Station with the bag slung over his right shoulder.

On the opposite side of the road were Inspector Fadzil (PW2) and Detective Shahidan. They were in the compound of a hotel next to the Mobil Petrol Station. Inspector Fadzil saw the Accused cross Jalan Putra from the area of the stalls. He saw him walk towards the Mobil Petrol Station. The Inspector stated that the Accused had a bag strapped from his right shoulder. As the Accused neared the place where there was an air pressure hose Inspector Fadzil and Detective Shahidan followed the man. Inspector Fadzil and Detective Shahidan followed the man. Inspector Fadzil said that as he and Shahidan neared the Accused he identified himself as a police officer and asked the man to stop ("Polis! Berhenti!") The Inspector said the Accused turned towards his right and saw him and Detective Shahidan and tried to run away. At that moment, he said, Detective Corporal Ariffin with his motor cycle appeared and Ariffin jumped on the Accused, coming from behind the Accused and catching him in an embrace from the back. The Accused was then handcuffed by Detective Shahidan. Inspector Fadzil stated that before the Accused was handcuffed, he took the bag from the Accused and opened it in front of him. He discovered two packages (P4 and P5) in the bag (P7). He tore the wrapping of one of the packages and dried plant material was exposed.

Detective Corporal Ariffin (PW3) substantially corroborated the evidence of Inspector Fadzil that the Accused crossed the road and walked towards the Mobil Petrol Station and that Inspector Fadzil and Detective Shahidan accosted the Accused. He stated that he heard Inspector Fadzil identify himself as the police and that the Accused tried to turn his head and that he jumped from his motor cycle towards the Accused and caught hold of him. He said he pounced on the man because it appeared that the man attempted to run away.

At this stage it has to be pointed out that Inspector Fadzil stated under cross-examination that he had written in his police report that the Accused had attempted to run away. As it turned out the police report did not contain that statement but I am satisfied that he had mistakenly thought that he had made such a statement in the police report. He explained that he had made a statement under s. 113 of Criminal Procedure Code (C.P.C.) and thought he had made it in the police report. His explanation does show he had a lapse of memory. His credit is therefore not impeached. His evidence on that matter will however have to be assessed when I consider the totality of the evidence after hearing the defence.

To get back to the primary facts adduced by the prosecution - the evidence showed that the bag (P7) and the two packages (P4 and P5) were handed by Inspector Fadzil to the investigation officer of the case, Chief Inspector Faizoo (PW5). This man then sent the same exhibits to the government chemist on 27 December 1989 and received them back on 20 January 1990. He handed the exhibits on 27 June 1990 to ASP Ibrahim Mydin (PW6) who when he went on transfer in turn handed them to Inspector Ramli (PW7) on 27 August 1992. Inspector Faizoo obtained the said exhibits from PW7 before the start of the trial. I am satisfied that the bag (P7) and the two packages (P4 and P5) examined by the chemist and produced in court were the same bag and packages seized from the Accused.

As stated earlier the defence disputed the evidence and conclusion of the government chemist that the dried plant material is "cannabis" within its meaning as defined under s. 2 of the Act. The chemist's evidence was that the cannabis in P4 and P5 came to 3011.3 grammes and the bag P7 (which the evidence showed held the two packages P4 and P5) contained traces of 'cannabis resin" as defined under the Act.

The defence attacked the chemist's evidence on two counts -

1. That since the 4 tests the chemist conducted on samples of the plant material were quantitative tests, 3 of which determined only the presence of cannabis resin, and since he did not quantify the amount of cannabis resin present, he had failed to prove that the resin had not been substantially extracted.
2. That since the chemist did not carry out tests on all the plant material in both packages P4 and P5, but merely tested 20 random samples from each package there was no proof that all the plant material in P4 and P5 is cannabis.

I will deal with the matter of the random samples first.

The chemist PW1 had stated that he had carried out 4 tests on each of 20 random samples of the dried plant material in package P4 and on each of the 20 random samples of the dried plant material in package P5. The chemist explained that he took random samples from each package (block) of plant material with each sample weighing between 1 to 2 grammes, and the samples were "from different places, different areas of the block". In his words, "These are random representatives samples. From these we concluded the rest of the plant material are the same ". According to the chemist 3 out of the 4 tests were meant, *inter alia*, to detect the presence of cannabis resin, "which would seem ... to be the soul of a cannabis plant ..." (per Peh Swee Chin SCJ in *Loo Keck Leong v. PP* [1992] 2 MLJ 177 at page 179). The chemist found an abundance of resin on the samples and it is in this context that the chemist explained why he did not examine the bulk of the plant material after examining the random samples. He stated that if a few of the samples did not show that abundance of resin that he found and did not show the positive results in the other tests that he conducted he would have been worried and he would have done further examination on rest of the bulk. The explanation of the chemist why he took random representative samples and not the whole bulk of plant material for testing is perfectly legitimate and I am satisfied, in view of what I have to say about the sufficiency of the tests and the conclusion of the chemist that cannabis resin had not been substantially extracted, that the plant materiall in P4 and P5 comprise cannabis, 3011.3 grammes of cannabis.

I now come to the attack of the defence on the chemist's failure to quantify the amount of cannabis resin present in the plant material; the argument was that such failure to quantify meant he failed to prove that the resin had not been substantially extracted.

The tests conducted by the chemist on the plant material were four fold involving, first, a gross physical examination, secondly, a microscopic examination of the plant material, then a test called the Duquenois Levine (D.L.) test and lastly the Thin Layer Chromotography (T.L.C.) test.

As for the gross physical examination the chemist found the plant material to be of the same plant material with features similar to those of cannabis. Under the microscope he further saw that the microscopic morphological features of the plant material were similar to those of cannabis and he also saw an abundance of sticky resin. When he did the D.L. test the test gave strong positive colouration indicating the presence of a high concentration of cannabis resin. And as for the T.L.C. test this test also showed strong positive spots indicating a high concentration of cannabis resin.

The chemist explained that from a combination of all 4 tests, from a totality of all the tests, not merely from one test, he concluded that the plant material in both P4 and P5 was cannabis and the cannabis resin had not been extracted.

In *Loo Keck Leong* the Supreme Court (at page 179) explained the significance of the definition of cannabis in the context of its resin not having been extracted, "We therefore hold that the resin should not have been substantially extracted (but not necessarily without a trace of the residue) and not necessarily that the

same should have been completely extracted that the plant material in any particular case for all practical purposes ceases to amount to such a dangerous drug - a harmless substance."

It is in this context of what is meant by non-extraction of the resin as stated above that the evidence of the chemist has to be understood. Firstly, the chemist had testified there was an abundance of the resin in the plant material he examined. Secondly, he explained that the plant material had not undergone any extraction process, either chemical or physically; if there had been chemical extraction all resin would have been removed and all tests (for the presence of the resin) would have been negative; if there had been physical extraction the plant material would have been crushed into bits but the plant material he inspected was still intact. Thus though he agreed that some resin might have been dislodged through handling of the plant material, and he could not tell how much resin the plant material originally held and how much was dislodged, he was positive that the resin had not been substantially extracted and that is a legitimate conclusion. And until evidence is adduced to the contrary I accept his evidence to that effect.

At the close of the case for the prosecution I am satisfied that the packages P4 and P5 contained 3011.3 grammes of a dangerous drug, cannabis as defined under s. 2 of the Act. The other primary facts in the case established that the Accused had custody and control of the bag which contained the cannabis. Under s. 37(d) of the Act he is presumed until the contrary is proved to have been in possession of the cannabis being in excess of the presumptive amount he is presumed until the contracy is proved to have trafficked in it.

Defence

The Accused elected to give his evidence on oath and he called 1 witness to testify on his behalf.

Th defence of the Accused was that he was carrying a bag which one Pak Teh (now deceased) had asked him to hold on to while the latter went to keep his mother cycle. The Accused said he did not know that the bag contained the cannabis.

The Accused stated that he left his home in Banting, Selangor, on the morning of 22 December 1989 and travelled by bus to Padang Besar to visit his wife's cousin, a Thai national, living on the Thai side of Padang Besar. His purpose was to tell the man that he was unable to go with him to Udon Tani, north of Bangkok, to visit his (The Accused's) Thai wife's relations. He met the man and spent the night in his house. The next day, 23 December 1992, he travelled within Thai territory to Danok, a Thai border town. He had a Malaysian international passport and he used it to cross into Malaysia, into Bukit Kayu Hitam. He said he intended to go home that day but at Bukit Kayu Hitam he met Aziz, an old friend, who was known as Pak Teh. Pak Teh told him that he was going to Kuala Lumpur the next day and invited him to accompany him and the Accused agreed.

The Accused said that he and Pak Teh then went to the latter's house at Jalan Changloon, Kodiang. He stayed the night there. That night (that is the night of 23 December 1992) Pak Teh introduced him to his brother-in-law Hamzah (DW2). He said he had seen this man before but had not spoken to him earlier.

The Accused stated that he spent the morning in Pak Teh's house on 24 December 1992 while Pak Teh went out. Pak Teh came back in the afternoon. At 7 p.m. they dressed and went to the house of Pak Teh's mother where thay hade a cup of coffee, then returned to Pak Teh's house. The Accused said he waited outside the house while Pak Teh went to take his motor cycle at his mother's house. When Pak Teh returned with the motor cycle he told the Accused he was going to the house of his brother-in-law to leave a message. Pak Teh then returned and they left for Alor Setar at about 7.10 p.m. He said Pak Teh had a sports bag with him "where clothings can be put into the bag which he placed in the carrier of the motor cycle.

He said he himself did not bring a bag nor any clothings or toiletries when he visited his wife's cousin in Padang Besar nor did he have a bag of his own with him for his return journey.

The Accused said that they reached Jalan Kancut, Alor Setar, at 8 p.m. where he passed RM20 to Pak teh to buy his bus ticket and when that was done Pak Teh told him they had to board the bus at the Mobil Petrol Station at Jalan Putra and that they had to be there a half hour before departure time which was at 9.30 p.m. They then proceeded to Jalan Putra at

about 8.15 p.m. Pak Teh told him that he wanted to keep his motor cycle at his friend's house and requested him to wait.

The Accused said he then got down and surrendered his helmet to Pak Teh. He wanted to cross the road but Pak Teh called him back. Pak Teh took his bag from the carrier and told him to hold on to the bag as it was difficult for him to handle the helmet and he wanted to put the helmet into the carrier.

The Accused said that he took the bag, crossed the road and went to a stall to have a drink. After he had his food and drink he waited till about 9 p.m. Then he crossed the road with the bag slung over his right shoulder. He walked towards the place where the pressure hose was located within the Mobil Petrol Station compound. He said that as he was walking towards that place he heard someone say "Polis". He turned right and saw a man and at that very same time he saw a motor-cyclist come from behind him. The motor cyclist pounced on him and he fell on his stomach and the bag in his hand fell to the ground. The man who introduced himself as the police took the bag, unzipped it and took out one of the contents of the bag and showed it to him.

His witness Hamzah bin Man (DW2) said that he had met the Accused in 1989 "one day before Christmas" in the house of his brother-in-law, Pak Teh. He said he saw the Accused that night and he had not seen him earlier. He stated that the following evening Pak Teh came to his house on a motor cycle and informed him that he was going to Kuala Lumpur and requested him to look after his mother and he said Pak Teh had a bag with him in front of the motor cycle. He said Pak Teh rode out through a stretch of road leading to the metalled road and the Accused waited by the roadside. He also stated that Pak Teh was shot by the army in Bukit Kayu Hitam. Pak Teh died on 26 June 1990. He said he was informed by the police that Pak Teh was shot because he was involved in a ganja case.

I can accept the evidence of the Accused that he has a relative, his wife's cousin, living in the Thai side of Padang Besar but I find it strange that his visit all the way up north from Banting, Selangor to Padang Besar was merely to inform this relative (who operated a coffee shop there) that he could not go with him to Udon Tani. His excuse for not sending a letter to his relative was that he did not know the address but I find that hard to believe considering that he had been to his relative's place several times with his Thai wife and he spoke some Thai; he must have at least known the street name and after all the address was not that of an ordinary house but that of a coffee shop in that street and a letter addressed to the coffee shop could have reached it.

He said he used his international passport to cross into Thailand to visit his relative and cross the border into Malaysia, Bukit Kayu Hitam on 23 December 1989. He stated, however, that he had left the passport at Pak Teh's house when Pak Teh took him to Alor Setar for the bus journey to Kuala Lumpur. He said it slipped off the back pocket of his trousers when he took his clothes off for a bath and he had placed it on an almari and had forgotten to take it. Apart from the fact that the passport is a valuable document it would have helped him establish his story of his visit to his cousin, showing that the trip all the way up north from Banting was an innocent trip. When asked if he was not interested in getting back his passport he said. "I am helpless since I am here - how can I go to take back my passport?" He was asked if relatives had visited him in prison and he answered in the affirmative. "You could have asked them to get passport from Pak Teh's house.", he was asked and his answer was, "I did not inform but I did leave a message to get it from Pak Teh's house." Later he changed his story and said he had told his family members of the whereabouts of the passport in Pak Teh's house but he did not know if they had gone to take it back. He appeared quite causal about an important piece of documentary evidence. I have grave doubts that the accused brought his international passport with him when he come up north. My view is that he fabricated the story about the passport being brought up north in order to support his story that he had gone over to Thailand to visit a relative and that he had crossed over from Tailand to Bukit Kayu Hitam where he allegedly met Pak Teh, all these, he wants the court to believe, being wholly unconnected with the drugs.

I can accept the Accused's evidence that there was a person by the name of Aziz who was also known as Pak Teh and that he is now dead; these facts were not challenged nor was the assertion by DW1 that Aziz was shot on 26 June 1990 by the army and that he was in-

volved in a cannabis case challenged by the prosecution. I can also except as probable the Accused's evidence that he knew Pak Teh. And it is also probabale the Accused did meet with Pak Teh before his (the Accused's) arrest.

I, however, do not accept the evidence of DW2 who claimed to have been Pak Teh's brother-in-law, that he saw the accused with Pak Teh one night in Pak Teh's house. At first he claimed he saw them on the eve of Christmas night. Later he said it was some other day. The evidence of DW2 was unconvincing. It appeared that he had memorised a certain date, "Christmas" and certain date which had to be pegged on to the 23rd and to the 24th of December with Christmas Day as a reference point to coincide with the Accused's story. However, when he gave his evidence he could not relate the date in sequence to coincide with the Accused's evidence as regards his activities with Pak Teh. He mentioned "Christmas" as if he had learnt it by rote and although his Counsel tried to prod his memory he could not give specific dates (though he could clearly state the exact date when Pak Teh died) and it was only towards the end when he was under cross-examination that he said the Accused spent the night in Pak Teh's house on the 23rd though he could not tell which month it was in and he prevaricated as to the year as well.

It may have been true that Pak Teh brought the Accused to the bus station at Jalan Kanchut to buy his bus ticket. And perhaps Pak Teh may have had a hand in the selling or delivering of the cannabis to the Accused before the bag of cannabis came into the hands of the Accused for trafficking.

Now for the evidence of Accused that he did not run away when he was accosted by the police. This was put in issue by the defence but he was not cross-examined on it. It may well have been that the Accused tried to avoid the motor cycle of PW3 as PW3 rushed towards the Accused on his motor cycle. But whether he attempted to run ot not is merely one aspect of the totality of the evidence.

Evaluating the totality of the evidence adduced I find it hard to believe that an adult of about 34 years of age and one who had served previously as a deckhand in the Customs Department would have been so naive to have thought that the cloth bag was a bag of clothes when the bag was heavy (it weighed about 3 kilogrammes) and the contents obviously not soft but solid and hard with well defined edges. And which man would surrender a bag of cannabis to another, even a friend, and risk the discovery of the cannabis in a bag that was merely zipped up with no padlock to secure the zip at one end?

I find the story of the Accused that Pak Teh was supposed to travel with him to Kuala Lumpur and he had gone to keep his motor cycle and that Pak Teh had handed his bag to the Accused because he wished to place the Accused's helmet in the carrier of the motor cycle as a fabricated story. It is not probabale in the context of the totality of the evidence which I had discussed earlier. The Accused was caught red handed with a bag of illicit drugs, the only bag he had with him for his return journey to Kuala Lumpur, and his story is a desperate attempt to shift the blame on to somebody else. The Accused's trip to the north was not an innocent trip as he made it out to be. And it is highly unlikely that someone would entrust an unlocked bag of illicit but valuable drugs, to another and risk discovery or loss.

I find that on the balance of probability that the Accused knew that the substance he was carrying in the bag was cannabis and that he was in possession of it. And I find that on the balance of probability he was trafficking in the said cannabis. The presumptions under s. 37(d) and s. 37(da)(vi) have not been rebutted. I find him guilty on the charge and I convict him.